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Whitcomb v. State Respondent's Brief Dckt. 38778

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

MICKY LEE WHITCOMB,)
)
Petitioner-Appellant,) NO. 38778
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF SHOSHONE**

**HONORABLE FRED M. GIBLER
District Judge**

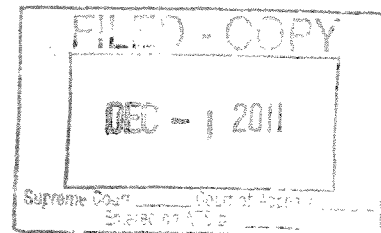
**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**ELIZABETH A. KOECKERITZ
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
RESPONDENT**

**MICKY L. WHITCOMB
IDOC #16983
381 W. Hospital Drive
Orofino, ID 83544**



**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Micky Lee Whitcomb appeals from the district court's order summarily dismissing his successive petition for post-conviction relief and denying his motion for appointment of counsel.

Statement Of Facts And Course Of Proceedings

The statement of facts of the underlying criminal case are set forth in State v. Whitcomb, Docket No. 21966, 1995 Unpublished Opinion No. 632 (Idaho App., December 22, 1995):

Micky Lee Whitcomb pleaded guilty to second degree murder and assault with intent to murder. These pleas were made in response to allegations that Whitcomb killed Sharon Webb by shooting her in the face at point-blank range with a high powered hunting rifle and that he then turned the gun on Webb's thirteen-year-old son [REDACTED] and fired again. [REDACTED] however, was not hit. The district court sentenced Whitcomb to a determinate life term for second degree murder and a consecutive fourteen-year determinate term for assault with intent to murder. Whitcomb did not appeal the judgment of conviction or sentences. Whitcomb did, however, file a timely motion under I.C.R. 35 for reconsideration of his sentences. Following a hearing, the motion was denied.

Whitcomb, at 1. Whitcomb appealed from the denial of his Rule 35 motion, which was affirmed by the Court of Appeals. Id.

Six years later, in 2001, Whitcomb filed an application for post-conviction relief alleging ineffective assistance of trial counsel. See Whitcomb v. State, Docket No. 27697, 2002 Unpublished Opinion No. 711 (Idaho App., August 21, 2002). The district court dismissed the petition as untimely and as raising issues that could have been raised on direct appeal. Id. at 1. The district court's order

was affirmed on appeal. Id. In 2007, Whitcomb filed a second Rule 35 motion. State v. Whitcomb, Docket No. 34139, 2008 Unpublished Opinion No. 338 (Idaho App., Jan. 24, 2008). The district court denied the motion, ruling it was an improper attack on the validity of Whitcomb's underlying conviction, and the court's order was affirmed on appeal. Id.

Finally, in 2011, Whitcomb filed a successive petition for post-conviction relief and motion for appointment of counsel, which are the subjects of this appeal. (R., pp. 2-10.) In his petition he alleged that his attorney was ineffective for failing to directly appeal his sentence. (R., p. 4.) In his supporting affidavit, Whitcomb claimed that he sent his attorney a letter asking her to directly appeal his sentence but that she failed to do so. (R., p. 20-22.) He attached a copy of the letter to his petition. (R., p. 19.) Whitcomb explained that he was unable to previously include the letter because he believed that his copy of the letter had been lost, but that it had now been re-discovered. (R., pp. 20-22.)

The district court denied Whitcomb's motion for counsel and filed a notice of its intention to dismiss Whitcomb's petition. (R., pp. 34-39.) It explained that Whitcomb's claim was identical to that made in his first petition for post-conviction relief, that it was time-barred, and that the post-conviction proceeding was not one "that a reasonable person with adequate means would be willing to bring" at his own expense. (R., pp. 37-39.) Whitcomb responded to the notice of intent to dismiss and renewed his request for appointment of counsel. (R., pp. 40-43.) The district court thereafter dismissed Whitcomb's petition for the reasons set forth in its notice of intent to dismiss. (R., pp. 44-45.) Whitcomb

timely appealed and requested appointment of appellate counsel. (R., pp. 48-52, 61-64.) His motion for appointment of appellate counsel was denied. (R., pp. 67-70.)

ISSUES

Whitcomb states the issues on appeal as:

1. Appellant is entitled to counsel to address the issues that could have been addressed in appeals, post-convictions, and the District Court abused his discretion in not appointing counsel.
2. Using the threat of the chair to coerce [sic] the Appellant into pleading guilty by both counsel and the prosecutor, especially when they knew there was no intent to commit murder in the 1st degree, an element of 1st Degree Murder.
3. Appellant is entitled to bring issues to this court since counsel's negligence to pursue [sic] and preserve issues presented herein.
4. The Time Bar doesn't apply to successive post-conviction relief petitions.

(Appellant's brief, p. 6 (emphasis in original).)

The state rephrases the issue as:

Has Whitcomb failed to show error in the summary dismissal of his petition for post-conviction relief and the denial of his request for counsel?

ARGUMENT

Whitcomb Has Failed To Establish That The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition And Denying His Request For Counsel

A. Introduction

Whitcomb challenges the district court's dismissal of his successive petition for post-conviction relief. (Appellant's brief, p. 6.) He also challenges the district court's denial of his request for appointment of counsel. (Id.) Whitcomb has failed to show error.

B. Standard Of Review And Legal Standards Applicable To A District Court's Decision To Grant Or Deny A Request For The Appointment Of Counsel In Post-Conviction Proceedings

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). The court's discretion is not unfettered, however. If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with

the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009).

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 “permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, “[t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.” Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001), quoted in Charboneau, 140 Idaho at 792, 102 P.3d at 1111.¹

¹ A post-conviction claim is properly dismissed if the petitioner fails to present evidence sufficient to show a material issue of fact on which relief can be granted. Workman v. State, 144 Idaho 518, 522-23, 164 P.3d 798, 802-03 (2007). Because this is a higher burden than demonstrating the possibility of a valid claim necessitating the appointment of counsel, Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), Melton v. State, 148 Idaho 339, 345, 223 P.3d 281, 287 (2009), the remainder of this section of the Respondent’s brief will focus on the “possibility of a valid claim” standard on the assumption that if Whitcomb did not show entitlement to counsel the dismissal of his claim is proper, but that if he did show entitlement to counsel then dismissal without the opportunity of counsel to appear was error.

C. Whitcomb Has Failed To Show Error In The Denial Of His Request For The Appointment Of Counsel To Pursue The Frivolous Claims Alleged In His Successive Post-Conviction Petition

Whitcomb has failed to establish the district court erred in denying his request for counsel because, as found by the district court, Whitcomb's petition was frivolous. (R., p. 37.) The petition was time-barred and was also an improper successive petition and, as such, failed to raise even the possibility of a valid claim.

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." In the case of successive petitions, the Idaho Supreme Court has "recognized that rigid application of I.C. § 19-4902 would preclude courts from considering 'claims which simply are not known to the defendant within the time limit, yet raise important due process issues.'" Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau, 144 Idaho at 904, 174 P.3d at 874). In those circumstances, the court will apply a "reasonable time" standard. Rhoades, 148 Idaho at 251, 220 P.3d at 1070. "In determining what a reasonable time is for filing a successive petition, [the court] will simply consider it on a case-by-case basis, as has been done in capital cases." Charboneau, 144 Idaho at 905, 174 P.3d at 875. However, absent a showing by the petitioner that the limitation period should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Rhoades, 148 Idaho

247, 220 P.3d 1066; Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001); Kriebel v. State, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009).

The claim presented in Whitcomb's successive petition, filed March 8, 2011 (R., p. 2), was filed beyond one year after his judgment became final in his underlying criminal case; Whitcomb filed his successive petition approximately 10 years after he filed his first petition for post-conviction relief and at least 15 years after he was sentenced. (R., pp. 12, 20.) Whitcomb has not argued that his claim was not known to him or could not have reasonably been known within the requisite time-frame for filing his initial post-conviction petition, nor can he. (See Appellant's Brief.) Ineffective assistance of counsel claim are presumed to be known when they occur. Rhoades v. State, 148 Idaho 247, 252, 220 P.3d 1066, 1072 (2009) ("We have repeatedly held that ineffective assistance of counsel claims can or should be known after trial.") Here, Whitcomb actually knew of his claim at least as early as the filing of his first petition. In fact, his claim in his successive petition is identical to his claim in his first petition, which the district court dismissed as untimely. (R., p. 38 (District court noting that "this is precisely the same assertion made on page three of petitioner's original time-barred petition in case no. SP 2001-2722.")) Thus, his successive petition was properly dismissed on this ground.

The district court also correctly dismissed the petition on the ground that it was an improper successive petition. The Uniform Post-Conviction Procedure Act ("UPCPA") provides: "All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application." I.C.

§ 19-4908. A successive petition is allowed only if “the court finds a ground for relief asserted [in the successive petition] which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.” I.C. § 19-4908; see also Stuart v. State, 118 Idaho 932, 933-34, 801 P.2d 1283, 1284-85 (1990); Nguyen v. State, 126 Idaho 494, 496, 887 P.2d 39, 41 (Ct. App. 1994).

Due process requires that a post-conviction petitioner be provided with a meaningful opportunity to have his or her claims presented. Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008); Hernandez v. State, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999); Abbott v. State, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996). To protect this right, the Idaho Supreme Court has recognized an exception to the prohibition against successive petitions for claims that were not known to the petitioner at the time of the original post-conviction action. Charboneau, 144 Idaho at 904-05, 174 P.3d at 874-75; Stuart, 118 Idaho at 933-34, 801 P.2d at 1284-85. Where the petitioner sets forth facts showing the claim upon which the successive petition is based was not known to the petitioner until after resolution of the first post-conviction action, such facts may constitute a sufficient reason entitling the petitioner to bring the successive petition. See Stuart, 118 Idaho at 933-34, 801 P.3d at 874-75 (considering merits of successive petition that set forth facts, with accompanying affidavits, alleging newly discovered information not known to petitioner at time of filing of first petition). Where, however, the petitioner alleges grounds for relief that “were known or should have been known at the time of the

first petition,” such grounds are “permanently waived” and do not constitute a sufficient reason to permit the filing of a successive petition. Id.

On appeal, Whitcomb does not argue that he gave the district court “sufficient reason” for not adequately presenting his ineffective assistance of counsel claim in his first petition. However, giving Whitcomb the benefit of the doubt and construing the pleadings most favorable to Whitcomb, it appears that he may be arguing that the re-discovery of the 1993 letter to his attorney constitutes “sufficient reason” for his failure to previously adequately present his claim. If this is, in fact, Whitcomb’s claim, he has failed to show error. Whitcomb knew of the letter’s existence (he wrote it) and his attorney’s purported failures as early as September 1993. (R., pp. 21-22.) Because the existence of this letter was known to Whitcomb even well before he filed his first petition, it cannot constitute a “sufficient reason” to permit the filing of a successive petition.

Because Whitcomb has failed to show he raised the possibility of a valid claim or a sufficient reason for filing a successive post-conviction petition, he has failed to show error in the district court’s denial of his request for counsel or the summary dismissal of his successive petition.

CONCLUSION

The state respectfully requests that this court affirm the district court’s order summarily dismissing Micky L. Whitcomb’s successive petition for post-conviction relief.

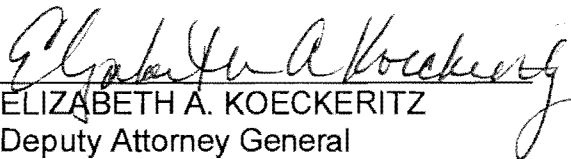
DATED this 1st day of December 2011.


ELIZABETH A. KOECKERITZ
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of December 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

MICKY L. WHITCOMB
IDOC #16983
381 W. Hospital Drive
Orofino, ID 83544


ELIZABETH A. KOECKERITZ
Deputy Attorney General

EAK/pm

